SUPREME COURT

OF THE

State of Connecticut

S.C. 20363

STATE OF CONNECTICUT

V.

FOTIS DULOS

AMICUS BRIEF OF THE HARTFORD COURANT COMPANY, LLC

WILLIAM S. FISH, JR., ESQ.
ALEXA T. MILLINGER, ESQ.
JEFFREY J. MIRMAN, ESQ.
HINCKLEY, ALLEN & SNYDER, LLP
20 Church Street, 18th Floor
Hartford, CT 06103
(860) 331-2700
(860) 278-3802 (Facsimile)
wfish@hinckleyallen.com
amillinger@hinckleyallen.com
Juris No. 428858

To Be Argued By:
WILLIAM S. FISH, JR., ESQ.
(860) 331-2700
(860) 278-3802 (Facsimile)

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STATEMENT OF ISSUE ON APPEAL

Whether, under the First Amendment to the United States Constitution and Article First of the Connecticut Constitution, the trial court exceeded its authority in issuing a broad, content-based gag order enjoining all "insiders" (which included all potential witnesses, members of law enforcement, and private citizens) from commenting on or disseminating information to the public and the media on *both* a pending investigation into the "disappearance of Jennifer Dulos" and a pending prosecution against the defendant Fotis Dulos ("Dulos") for tampering with evidence and hindering prosecution.

TABLE OF AUTHORITIES

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STATEMENT OF INTEREST OF THE COURANT[1]

The Hartford Courant Company, LLC (the "Courant"), as a member and representative of the media, has a strong interest in the subject matter of this appeal to ensure that any gag order issued by the trial court satisfies the constitutional rights of the press to gather and report the news. It is well-established that the press has a right to challenge a gag order that impinges on its First Amendment rights, including its right to gather news. *See Application of Dow Jones & Co., Inc.,* 842 F.2d 603, 607 (2d Cir. 1988)(holding news agencies have standing as recipients of speech to appeal gag order); *Brown v. Damiani*, 154 F. Supp. 2d 317, 321 (D. Conn. 2001)(same); *Connecticut Magazine, Div. of Arc Communications, Inc. v. Moraghan*, 676 F. Supp. 38, 40 (D. Conn. 1987)(press has standing to challenge a gag order that impinges on its First Amendment right to gather news); *CBS, Inc. v. Young,* 522 F.2d 234, 237-38 (6th Cir. 1975)(same).

"Without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972). *See also Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 583 (1980); *CBS, Inc.*, *supra*, 522 F.2d at 238 ("[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it.").

Here, the Courant has extensively covered the Dulos matter and has a strong interest in gathering news related to this matter, including from sources with first-hand knowledge. Any gag order impinges on this critical right as it interferes with the Courant's ability to hear and gather information from sources closest to the proceedings.

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[1] Consistent with Connecticut Practice Book §67-7, no counsel for any party wrote this brief in whole or in part, and no counsel for a party, or a party, or any other persons other than the amicus curiae, its members or its counsel, contributed to the cost of the preparation or submission of this brief.

NATURE OF PROCEEDINGS AND STATEMENT OF FACTS

On June 3, 2019, the State arrested Dulos pursuant to a two-count warrant charging him only with tampering or fabricating physical evidence and hindering prosecution. (A34).[2] Three months later, the State arrested him on a second warrant charging him only with an additional count of tampering with evidence. (A54). These arrests came as authorities investigated the disappearance of his estranged wife, Jennifer Dulos. (A1). Her disappearance captured the attention of the media in Connecticut and beyond. (A2, n.1).

On September 21, 2019, the Superior Court (Blawie, J.) issued a Decision and Order, acting on a one-page motion by the State,[3] barring all "insiders" involved in *both* the investigation and the criminal case pending against Dulos from making extrajudicial statements to the public and the media (the "Gag Order")(A1-33). The Gag Order is sweeping in its scope as to who and what is covered. It extends beyond just "counsel for both sides" and applies to Dulos, his family, associates, law enforcement, all potential fact and expert witnesses, private citizens, and anyone involved in the *investigation* into Ms. Dulos' disappearance (separate and apart from the pending criminal case against Dulos). (A31-32). The Gag Order is so broad that it inevitably applies to individuals who likely are unaware of the Gag Order or that it nominally applies to them (presumably this is why the Gag Order orders counsel to notify these individuals)(*Id.*).

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[2] The citation references to Appendix throughout are to the Appendix filed by Dulos.
[3] The State's motion sought a gag order directed *only* at counsel for both sides, but the trial court dramatically expanded that effectively to include all persons with any knowledge related to the investigation into Jennifer Dulos' disappearance.

ARGUMENT[4]

I. The Gag Order Chills Newsgathering, Leads to Less Accurate Reporting, and Deprives the Public of Information.

In a time where distrust in public institutions is skyrocketing, the role of the media is ever more crucial. For centuries, openness has been an "indispensable" element of trials and pretrial proceedings. *Richmond Newspapers, supra,* 448 U.S. at 597. As the U.S. Supreme Court has recognized, secrecy breeds "distrust" of the judicial system and its ability to adjudicate matters fairly. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). The benefits of an open and transparent legal system are manifold, both to the parties and to the public. Openness gives "assurance that the proceedings [are] conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569. *See also Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 & n.4 (4th Cir. 1988).

Because journalists frequently seek to gather the news by interviewing parties and witnesses, pretrial gag orders on trial participants undermine these foundational principles of openness. *CBS, supra,* 522 F.2d at 238-240. Indeed, "[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it." *Id.* at 237. Sources enhance accuracy in reporting, increase transparency and reader trust, and enrich news stories. Without sources, the quality and thoroughness of news coverage of court cases suffers, affecting the quality of information reaching the public.

Here the breadth of the Gag Order (including its applicability to potential witnesses and others involved in the investigation) will undoubtedly deter sources from speaking with

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[4] The standard of review is plenary. *See Yeager v. Alvarez*, 302 Conn. 772, 778 (2011) ("The scope of judicial authority is a matter of law over which we exercise plenary review.") (citing *Burton v. Mottolese,* 267 Conn. 1, 25, 835 A.2d 998 (2003)).

the media rather than risk a possible contempt proceeding. This in turn will affect newsgathering and limit information available to the public concerning this matter.

II. The Gag Order is Both a Prior Restraint on Speech and a Content-Based Restriction on Speech.

The U.S. Supreme Court has called prior restraints "the most serious and the least tolerable infringement" on our freedoms of speech and press. *Nebraska Press Ass'n, v.* Stuart, 427 U.S. 539, 559 (1976). *See also Tunick v. Safir,* 209 F.3d 67, 91 (2d Cir.2000). The Supreme Court has described the elimination of prior restraints as the "main purpose" of the First Amendment. *Nebraska Press,* 427 U.S. at 557.

On its face, this Gag Order, like all gag orders, is a prior restraint on speech. "A 'prior restraint' on speech is a law, regulation, or judicial order that suppresses speech - or provides for its suppression at the discretion of government officials - on the basis of the speech's content and in advance of its actual expression." *United States v. Quattrone,* 402 F.3d 304, 309 (2d Cir. 2005).

Protections against prior restraints are even stronger under Sections 4 and 5 of Article First of the Connecticut Constitution. In *State v. Linares*, 232 Conn. 345, 380-81 (1995), the Connecticut Supreme Court cited with approval Judge Schaller's observations in his concurring opinion below that the specific language in Sections 4 and 5 is *stronger* than its federal counterparts.

The Gag Order also implicates another form of speech regulation: a *content-based* restriction on speech. As recently recognized by the Fourth Circuit, "gag orders warrant a most rigorous form of review because they rest at the intersection of two disfavored forms of expressive limitations: prior restraints and content-based restrictions." *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-797 (4th Cir.2018).

Content-based restrictions target "particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). *See also In re Murphy-Brown,* 907 F.3d at 797 ("gag orders are presumptively unconstitutional because they are content based.")(citing *Nat'l Inst. Of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018)).

The Gag Order is a content-based restriction because its sole purpose is to regulate what may and may not be said *by anyone* including potential witnesses with respect to the pending investigation and criminal charges. It is divided into two categories based on what can and cannot be said. (A31-32). Clearly, the main purpose of the Gag Order was to "suppress speech. . . of a certain content," namely the topics listed at A89. This is a quintessential content-based regulation. Content-based restrictions on speech are "almost always unconstitutional." *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006)("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."). *See also Nat'l Inst. of Family & Life Advocates,* 138 S. Ct. at 2371 (content-based restrictions on speech are "presumptively unconstitutional."). The Gag Order may be upheld only if it survives a strict scrutiny analysis. *Reed,* 135 S. Ct. at 2231.

III. The Gag Order Does Not Satisfy Applicable Constitutional Requirements.

A. As a Content Based Restriction on Speech, the Gag Order does not Survive Strict Scrutiny.

As a content-based restriction, the Gag Order can survive strict scrutiny only if it furthers "a compelling interest and is narrowly tailored to achieve that interest." *Reed, supra,* 135 S. Ct. at 2231.

As to the compelling interest here, the Gag Order seeks to curtail pretrial publicity on the belief that it may interfere with Dulos' constitutional right to a fair trial. (A68-69).[5] However, as the Fourth Circuit held just one year ago, publicity alone is not enough to justify a gag order. *In re: Murphy Brown,* 907 F.3d at 798.

Simply stated, the reasons set forth in the Gag Order do not establish that pretrial publicity will have a prejudicial effect on the charges actually pending against Dulos. This point highlights precisely why the Gag Order is overbroad. Dulos has been charged only with tampering with evidence and hindering prosecution. (A34, 52). He has *not* been charged with murder, kidnapping, or any crime implicating him in Jennifer Dulos' disappearance. However, the concerns the Gag Order espouses are all connected to her disappearance. In pointing to specific examples of publicity to justify the Gag Order, the Gag Order cites "that Jennifer Dulos is psychologically unstable, addicted to drugs, and that she consorted romantically with drug dealers." (A21). The Gag Order does not, however, show how these examples might relate to those charges actually pending against Dulos or how a Gag Order directed at witnesses and other third parties would affect a trial of those pending charges. Instead, the trial court took the unprecedented step of issuing a Gag Order preventing virtually *everyone* from commenting on the investigation of a possible crime *for which no one has been charged.*[6]

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[5] The trial court's comments suggest that its concern may be more about "fan[ning] the flames" of publicity (A2) concerning the investigation than with publicity that may prove prejudicial to a fair trial on the charges actually pending against Dulos.

[6] Given the actual charges pending against Dulos, the Gag Order also is grossly disproportionate to those charges. Much like sentencing, any gag order must be proportional to the matter at hand. *See State v. Santiago*, 318 Conn. 1, 20 (2015).

Jurors also are not expected to go into any trial ignorant. *See In re: Murphy-Brown,* 907 F.3d 788 at 798 ("Prominence does not necessarily produce prejudice, and juror *impartiality* ... does not require *ignorance*.")(quoting *Skilling v. United States,* 562 U.S. 358, 381 (2010)). Over-cautious judicial intervention is unnecessary because "jurors are not that fragile." *Id.* at 798. Courts routinely employ curative instructions to mitigate against potential juror bias, including instructions on evidence establishing a person's bad character. *Id.* "Moreover, courts often tell jurors to disregard statements at trial that should not have been made or evidence that should not have been admitted. Courts also routinely instruct jurors to consider potentially prejudicial evidence, when admitted, only for a non-prejudicial purpose." *Id.*

Even if the Gag Order furthered a compelling interest, it must be the "least restrictive means" of furthering that interest in order to survive Constitutional scrutiny. *In re Murphy-Brown,* 907 F.3d at 799 (citing *Ashcroft v. ACLU,* 535 U.S. 564, 666 (2002)). Here, the Gag Order is not narrowly tailored to achieve its purpose, let alone the least restrictive means. The Gag Order extends beyond comments by lawyers for the parties and includes law enforcement, all potential witnesses and all private citizens with (perhaps) relevant information to the investigation. (A88).Moreover, the Gag Order makes no specific findings as to why speech from each of the enumerated groups of individuals is problematic. *See In re Murphy-Brown,* 907 F.3d at 799 (holding a gag order was not narrowly tailored in part because "it included no findings specific to the various individuals it restricted."). This distinction between groups of restricted individuals is significant because statements from non-trial participants carry a much lower risk of prejudice than those from trial participants or lawyers. *United States v. Scarfo*, 263 F.3d 80, 92 (3d Cir. 2001) ("The Supreme Court

and Courts of Appeal have announced varying standards to review gag orders depending on who or what is being gagged.").

The trial court relied in part on *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (justifying restrictions on lawyers' speech in certain circumstances because "lawyers have special access to information")(A15). *Gentile*, however, only applies to trial counsel in a case and does not justify imposing a gag order on, for example, potential witnesses. More importantly, given the limited pending charges against Dulos, *Gentile* does not justify the far-reaching Gag Order issued here.[7]

The trial court also relied on *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000). However, *Brown* did not consider the press' constitutional right to gather and report news nor did it discuss the strict scrutiny required when reviewing a content based restriction on speech. (Brown predated *Reed v. Gilbert*).

There are a number of tools available to a trial court to ensure a fair trial short of broad gag orders, including "enlarged jury pools, *voir dire*, changes to a trial's location or schedule, cautionary jury instructions, and, in more unusual circumstances, sequestration." *In re Murphy-Brown,* 907 F.3d at 799. Although *Murphy Brown* construed a gag order in the context of a civil trial, it held that the gag order was not the least restrictive means to further the public interest because the court had not explained why other tools were insufficient to mitigate the risks. *Id.* Notably, the court emphasized the *voir dire* process' role in identifying jurors unable to render a fair verdict. That argument is even more compelling here given that Connecticut employs an individual *voir dire* system. *See* Conn. Const. art. I, § 19.

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[7] The Gag Order also relies on Practice Book §42-48, but the Practice Book must bow to the United States and Connecticut Constitutions.

The Gag Order mentions in passing but does not explain why a change of venue, a thorough *voir dire* and cautionary jury instructions would not mitigate any risk posed by pretrial publicity. (A27). In short, there are multiple less restrictive means of ensuring a fair trial for Dulos well short of the extraordinary steps taken here.

B. <u>As a Prior Restraint on Speech, the Gag Order is Unconstitutional</u>.

Even if this Court declines to apply strict scrutiny to the Gag Order, many of the same reasons set forth above warrant the Gag Order being struck as an unconstitutional prior restraint. Indeed, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Nebraska Press Ass'n*, 427 U.S. at 558 (citing *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963)).

The Supreme Court has set forth the following factors when considering a gag order as a prior restraint: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Nebraska Press Ass'n,* 427 U.S. at 562. When evaluating these factors, some courts have required a clear and present danger to a fair trial, while other courts have required a reasonable likelihood or a substantial likelihood of prejudice to a fair trial. *See Brown*, F.3d at 427 (collecting cases). Although the clear and present danger test is appropriate here, especially given the strict scrutiny required for a content based restriction and given Article First of the Connecticut Constitution, under any formulation the Gag Order fails, especially for non-lawyers not subject to *Gentile.*

As to the nature and extent of the pretrial news coverage, as discussed above, the Gag Order is not aimed at publicity about the crimes for which Dulos is *actually charged.* Instead, the offending news coverage cited in the Gag Order primarily relates to the disappearance of Jennifer Dulos. Without that connection, the Gag Order turns on the mere fact that extensive publicity exists (*see* A27). However, under any applicable test, that does not render a trial unfair in this or in any other case. *See Nebraska Press Ass'n,* 427 U.S. at 554 ("we have held in other cases that trials have been fair in spite of widespread publicity.")

The Gag Order concludes without explanation that a change of venue would not remedy the problem (A27), and it does not analyze why other means (extensive *voir dire*, jury instructions, or a more narrow order) would not abate the anticipated issues. *Id.* The Gag Order also assumes but does not explain why it would "prevent the threatened danger." Given the amount of media interest to date, it is beyond peradventure that media coverage will continue even with the Gag Order in place and that potential jurors will be exposed to it. (A21). More importantly, this coverage will take place without the benefit of sources leading to less accurate reporting. *See Nebraska Press Ass'n,* 427 U.S. at 567 (finding that a gag order would not necessarily be effective in part because "[o]ne can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts.").

CONCLUSION

For the foregoing reasons, the Courant submits that the Gag Order is an unconstitutional abridgement of the freedoms guaranteed by the Connecticut and United States Constitutions and that this Court should terminate the Gag Order.

Respectfully Submitted,

THE HARTFORD COURANT COMPANY, LLC

By *_/s/ William S. Fish, Jr._*

William S. Fish, Jr.
Alexa T. Millinger
Hinckley Allen & Snyder, LLP
20 Church Street, 18th Floor
Hartford, CT 06103
Phone: (860) 331-2700
Fax: (860) 278-3802
Juris No. 428858
wfish@hinckleyallen.com
amillinger@hinckleyallen.com

CERTIFICATION OF COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate procedure § 67-2, that on this 5th day of November, 2019:

(1) The electronically submitted brief was delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address was provided; and

(2) The electronically submitted brief and the filed paper brief have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and

(3) A copy of the brief was sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) The brief filed with the appellate clerk is a true copy of the brief that was submitted electronically; and

(5) The brief complies with all provisions of this rule.

/s/ William S. Fish, Jr.
William S. Fish, Jr.

CERTIFICATION OF SERVICE

I hereby certify that on the 5th day of November, 2019 a copy of The Hartford Courant, LLC's Amicus Brief was sent via electronic mail in compliance with Practice Book §62-7 to the following counsel of record:

Norman A. Pattis, Esq.
Kevin Smith, Esq.
Pattis & Smith
383 Orange Street, 1st Floor
New Haven, CT 06511
(203) 393-3017
(203) 393-9745 (fax)
npattis@pattisandsmith.com

Richard J. Colangelo, Jr.,
State's Attorney
Superior Court
123 Hoyt Street
Stamford, CT 06905
(203) 965-5215
(203) 965-5791 (fax)
Richard.Colangelo@ct.gov

Robert J. Scheinblum
Senior Assistant State's Attorney
Appellate Bureau
OCSA
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5807
(860) 258-5828 (fax)
DCJ.OCSA.Appellate@ct.gov

/s/ William S. Fish, Jr.
William S. Fish, Jr.